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**IN THE
COURT OF APPEALS OF INDIANA**

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No. 45A04-0806-CR-333

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0606-FB-61

JANUARY 2, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Veltor L. Cotton, Jr., appeals his conviction by jury of two counts of causing death when operating a motor vehicle with an alcohol concentration of at least 1.5 g/ml of blood, both class B felonies. We affirm.

Cotton raises three issues for our review:

1. Whether the trial court erred in allowing Gary Police Department Corporal Agnes Roberts to testify;
2. Whether the trial court erred in allowing witnesses to testify in violation of the court's pretrial discovery order; and
3. Whether there is sufficient evidence to support Cotton's convictions.

The facts most favorable to the verdict reveal that at approximately 2:00 a.m. on August 20, 2005, Horace Matthews was sitting at a light at 45th Street and Broadway in Gary when he noticed a GMC Safari Van traveling north on Broadway at a high rate of speed. Matthews, who estimated that the van was going 90 to 100 miles per hour in a 35 mile per hour zone, was concerned that the van would hit his acquaintance, Jackie Goosby, who had just turned north on Broadway. Matthews turned north on Broadway to follow the van.

In the meantime, Goosby looked in her rearview mirror and saw the van approaching her at a high rate of speed. The van swerved around her and continued over the crest of a hill on Broadway. When Goosby got to the top of the hill, she watched as the van became airborne and landed on the back end of a Buick Roadmaster driven by fifty-eight-year-old Alex Edwards. Edwards and his passenger, fifty-three-year-old Anible Macklin, were returning home from work. When the van landed on Edward's car,

the car's rear end caught fire. The car then spun up onto the sidewalk and hit the side of a building. Edwards and Macklin were both killed instantly by the impact of the collision, and their bodies were burned by the fire.

The impact of the collision also caused the thirty-two-year-old driver, Cotton, to hit his head on the windshield hard enough to "spiderweb" the glass, and to hit his abdomen on the steering wheel hard enough to bend it. Tr. at 696. As the van spun out of control across Broadway, Cotton was thrown out of the open driver's side window. The van came to a stop after it knocked down a wrought iron fence surrounding a church. When Matthews arrived on the scene, Cotton was lying in the street in a puddle of blood caused by a head injury.

Gary Police Department Officer Willie Oliver was dispatched to the scene. When he arrived, the officer noticed that the van's driver's side window was rolled down, and the passenger's window was rolled up and unbroken. Officer Oliver also noticed that there was a head imprint in the van's windshield just over the steering wheel.

Cotton was transported to the hospital by ambulance. Mark Douglas, the paramedic who sat with Cotton in the back of the ambulance, smelled the odor of alcohol on Cotton. The results of a subsequent blood draw at the hospital revealed that Cotton had an alcohol concentration of more than 1.5 g/ml of blood. Cotton also had a six-inch laceration on his head, a fractured pelvis and a dislocated hip.

Cotton was charged with two counts of operating a motor vehicle with an alcohol concentration of at least .15 g/ml of blood as class B felonies and two counts of reckless homicide as class C felonies. At trial, over Cotton's objection, Corporal Agnes Roberts,

hit and run investigator for the Gary Police Department, gave her opinion as to how the accident occurred.

Specifically, Corporal Roberts testified that the impact took place in the outside northbound lane of the 4200 block of Broadway when the van became airborne and landed in the rear driver's side of the Buick. Corporal Roberts further explained that gouge marks in the street were caused by the van forcing the Buick's rear bumper to the ground, causing sparks that ignited gasoline leaking out of the ruptured gas tank, and splashing around on the inside of the car.

According to Corporal Roberts, when the van hit the Buick in a downward motion, the momentum carried the van's driver upward and forward, causing him to hit his head on the windshield and damage it. Corporal Roberts explained that she often sees "spiderweb" windshields in rear end collisions when the driver is thrown forward on impact and his head hits the windshield. Tr. at 696. Corporal Roberts further testified that after the van hit the car, the van began to rotate clockwise, and the momentum threw the driver out of the driver's side window. The van then slid into a wrought iron fence and came to a stop. The Buick, on the other hand, went up on the sidewalk on the opposite side of the street and hit a building. Corporal Roberts explained that her opinion as to what happened during the accident was based upon what she observed at the scene that night and the following morning as well as her experience as the Gary Police Department's sole hit and run investigator.

The testimony at trial also revealed that Cotton's head injury was consistent with having hit his head on the windshield, and his fractured pelvis and dislocated hip were

consistent with having hit his abdomen on the steering wheel. In addition, the testimony revealed that the van was registered to Cotton's father, Veltor Cotton, Sr.

The jury convicted Cotton of all counts, and the trial court entered judgment of conviction on the two counts of causing death when operating a motor vehicle with an alcohol concentration of at least .15 g/ml of blood as class B felonies. The court sentenced Cotton to fifteen years for each of the counts, sentences to run consecutively. Cotton appeals. Our discussion of the issues includes additional facts.

Cotton first argues that the trial court erred in allowing Corporal Roberts to testify. The gravamen of Cotton's argument appears to be that Corporal Roberts was not qualified as an expert under Indiana Evidence Rule 702 because she was not a certified accident reconstructionist.

The admission of evidence is within the sound discretion of the trial court. *Davis v. State*, 791 N.E.2d 266, 268 (Ind. Ct. App. 2003), *trans. denied*. The decision whether to admit evidence will not be reversed absent a showing of manifest abuse of the trial court's discretion resulting in the denial of a fair trial. *Id.* In determining the admissibility of evidence, the reviewing court will only consider the evidence in favor of the trial court's ruling and unrefuted evidence in the defendant's favor. *Id.*

Here, regardless of whether Corporal Roberts was qualified to testify as an expert under Rule 702, we have previously determined that a witness, who is not qualified to offer expert testimony under Indiana Evidence Rule 702, may be qualified to testify as a "skilled witness" under Indiana Evidence Rule 701. *See Haycraft v. State*, 760 N.E.2d 203, 211 (Ind. Ct. App. 2001), *trans. denied*. A skilled witness is a person with "a degree

of knowledge short of that sufficient to be declared an expert under Indiana Evidence Rule 702, but somewhat beyond that possessed by ordinary jurors.” *Id.*

Under Rule 701, a skilled witness may testify to an opinion or inference that is (a) rationally based on the witness’s perception and (b) helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue. The requirement that the opinion be “rationally based” on perception means that the opinion must be one that a reasonable person could form from the perceived facts. *Davis v. State*, 791 N.E.2d 266, 268 (Ind. Ct. App. 2003), *trans. denied*. The requirement that the opinion be “helpful” means, in part, that the testimony gives substance to the facts, which are difficult to articulate. *Id.*

Here, the State developed a foundation to establish Corporal Roberts’ qualifications to give her opinion about how the accident occurred. At the time of Cotton’s trial, Corporal Roberts had been with the Gary Police Department for twelve years. She had performed traffic investigations for five years and had been the sole hit and run investigator for seven years. She had investigated hundreds of automobile collisions, and attended training classes in Indianapolis and an accident reconstruction course at Northwestern in 2002. Given this background, Corporal Roberts was sufficiently qualified to testify as a skilled witness. *See id.*

Further, Corporal Roberts, who arrived at the scene of the accident shortly after it occurred, testified that her opinion as to what happened during the accident was based upon what she observed at the scene that night and the next day as well as her experience

as the sole Gary Police Department Hit and Run Investigator. As such, the trial court did not err in allowing her to testify. *See id.*

Cotton next argues that the trial court erred in allowing two witnesses to testify in violation of the court's pretrial discovery order. On the second day of trial, the State informed defense counsel that it intended to present the testimony of two additional witnesses, Rick Regaldo, who drew Cotton's blood sample the night of the accident, and Toni Hughes, who tested the blood sample at the lab. The State's discovery answer did not include these witnesses, and the State did not identify these witnesses to the prospective jury during jury selection. Cotton filed a motion to strike the witnesses, and the State responded that it had just learned the names of the witnesses. After hearing argument, the trial court offered defense counsel the opportunity to speak to the witnesses but denied Cotton's motion to strike them. Cotton did not request a continuance.

The State does not dispute that the witnesses were permitted to testify in violation of the court's pretrial discovery order. Ordinarily, absent clear error and resulting prejudice, the trial court's determination of discovery violations and sanctions will be affirmed. *Fleming v. State*, 833 N.E.2d 84, 91 (Ind. Ct. App. 2005). When reviewing a challenge to discovery matters, we must give a trial court wide discretionary latitude. *Id.* Because the trial court has a duty to promote the discovery of the truth and to guide and control the proceedings, the court will be granted deference when assessing what constitutes substantial compliance with discovery orders. *Id.* In cases where there has been a failure to comply with discovery procedures, the trial court is usually in the best position to determine the dictates of fundamental fairness and whether any resulting harm

can be eliminated or satisfactorily eliminated. *Id.* If remedial measures are warranted, a continuance is usually the proper remedy. *Id.* Failure to request a continuance, where a continuance may be an appropriate remedy, constitutes a waiver of any alleged error pertaining to noncompliance with the trial court's discovery order. *Id.*

Here, because Cotton failed to request a continuance, he has waived appellate review of this issue. *See id.* Waiver notwithstanding, we find no error or resulting prejudice stemming from the trial court's ruling on this matter. Defense counsel knew that Cotton's blood was drawn shortly after the accident and later tested in a lab. Counsel also knew the results of the lab test and did not challenge them.

Lastly, Cotton argues that there is insufficient evidence to support his convictions. Specifically, he contends that there is insufficient evidence that he was driving the van at the time of the collision. Our standard of review for sufficiency of the evidence is well settled. We will neither reweigh the evidence nor judge the credibility of witnesses. *Tobar v. State*, 740 N.E.2d 109, 111 (Ind. 2000). Rather, we will affirm the trial court if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Id.* at 111-12.

Here, our review of the record of the proceedings reveals that the van's windshield was damaged during the collision and had a head imprint in it. Cotton's head injury was consistent with having hit his head on the windshield on impact, causing the imprint and damage. The van's steering wheel was also bent during the collision. Cotton's dislocated hip and fractured pelvis were consistent with having hit his abdomen on the

steering wheel on impact, causing it to bend. In addition, Goosby saw someone fly out of the van as it spun out of control across Broadway. The driver's side window was rolled down, and Cotton was found in the middle of the street in a pool of blood. We further note that the van was registered to Cotton's father. This evidence is sufficient to support the jury's finding that Cotton was driving the van at the time of the collision, and to therefore support Cotton's convictions.

Affirmed.

BARNES, J., and MATHIAS, J., concur.